Office Supreme Court, U. S.
FILED
APR 12 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

No. [redacted]

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner

vs.

SIERRA PACIFIC POWER COMPANY

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PACIFIC GAS AND ELECTRIC COMPANY,

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vs.

SIERRA PACIFIC POWER COMPANY

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PACIFIC GAS AND ELECTRIC COMPANY prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 24, 1955, and modified by order of said Court entered March 23, 1955, in a proceeding entitled "Sierra Pacific Power Company, Petitioner, v. Federal Power Commission, Respondent, Pacific Gas and Electric Company, Intervener."[1]

1. In case No. 736 the Federal Power Commission is seeking review of the same judgment. The record here is the same as that in the Commission's case.

OPINIONS BELOW

The opinion of the Court of Appeals and its order of modification are printed as Appendices A and B hereto. The pertinent opinion and order of the Federal Power Commission is printed as Appendix C hereto. These opinions have not, as yet, been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1955 and the order of modification thereof was entered on March 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act.

QUESTIONS PRESENTED

1. Does the rate filing procedure prescribed by Section 205 of the Federal Power Act for obtaining a rate increase apply to Petitioner's rate for electric power service to Sierra Pacific Power Company, such rate being embodied in a contract between the two companies?

2. Is a contract specified rate outside Commission control as long as such rate is within the judicially-determined zone of reasonableness?

3. Should the Commission, having originally granted full hearing and received evidence on the issue of the unreasonableness of the contract rate be precluded on remand from considering the case further and making a formal finding on that issue after its order has been set aside by the Court of Appeals for lack of such a finding?

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, frequently referred to herein as the "Act" are printed as Appendix D hereto.

STATEMENT

The ultimate question in this proceeding is whether Petitioner, Pacific Gas and Electric Company, (hereinafter called PG&E) is entitled to an increase in its rate for wholesale electric power service to Sierra Pacific Power Company (hereinafter called Sierra).

Since 1923 PG&E has supplied increasing amounts of power at Donner Summit in California to Sierra, which in turn has resold the major part of the power to its retail customers in Nevada, though a portion has been resold in California. Sierra owns and operates five small hydroelectric generating plants, but relies primarily on PG&E for its power supply, paying $1,228,138 therefor in 1952.

In 1948 PG&E entered into the third of the series of contracts under which these power deliveries were made. In the light of *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), the jurisdiction of the Federal Power Commission over all sales under the contract is clear and the Commission has so found.[2] Like the contract which it superseded, the 1948 contract was filed with the Federal Power Commission, which designated it as PG&E's rate schedule F.P.C. No. 3 and fixed its effective date as of January 1, 1948.

At the time the contract was entered into, PG&E supplied power to Sierra over two 60,000 volt transmission lines. The contract required PG&E to construct an additional line for operation at 110,000 volts and, when Sierra's load should require it, to provide another 110,000 volt line. The contract was to terminate fifteen years from the date the first 110,000 volt line was placed in service, but if the second 110,000 volt line was required within that time then the term was to extend until fifteen years after that line was

2. Appendix C, p. 33.

placed in service. The first 110,000 volt line was placed in service in 1949 and the evidence showed that the second line will be required in 1956. The contract will, therefore, cover a period of about 23 years, ending in 1971.

On February 2, 1953, in order to meet a very substantial increase in its costs, PG&E initiated the present proceeding by filing with the Federal Power Commission a proposed increase in the Sierra rate, designated Supplement No. 1 to Schedule F.P.C. No. 3. On March 13, 1953, the Commission ordered a hearing concerning the lawfulness of the proposed increase and ordered suspension thereof for five months following the proposed effective date of April 6, 1953. Sierra intervened and requested the Commission to reject the filing on the ground that, because the rate was embodied in a contract, no increase could be filed under Section 205(d) of the Act or otherwise made effective except by a proceeding under Section 206(a) of the Act in which the Commission first determined that the contract specified rate was unlawful.

The Commission granted permission to intervene, but refused to reject the filing, preserving to Sierra its right to maintain its contentions thereafter. Hearings were held by the Commission on nine days in April and May, 1953, at which all parties were afforded full opportunity to present evidence in support of their contentions. In the briefs filed thereafter PG&E requested a finding that the contract rate was unreasonable and Sierra requested a contrary finding. Oral argument was had before the full Commission, following which, on September 21, 1953, the Commission ordered reargument on specified questions. Further hearings were held on two days in March 1954, and the matter was again argued orally before the full Commission.

In the meantime, on September 6, 1953, the increased rate became effective subject to a Commission order requiring accounting for the amount of the increase collected, to permit refund of any portion thereof not found justified.

On June 17, 1954, the Commission issued its Opinion and Order Terminating Proceeding[3] in which it found, among other things, that the proposed increased rate was not unreasonable, unjust or unlawful. This finding was based on evidence that PG&E would earn only a 4.75% return from its sales to Sierra. The Commission recognized, however, that other considerations than cost of service could affect the reasonableness of the rate. It, therefore, carefully reviewed Sierra's evidence and contentions that the existence of the contract and alleged circumstances surrounding its negotiations made the old contract rate still reasonable despite the decline in rate of return to 2.6%. The Commission concluded that sufficient reason had not been shown for departing from the cost of service (i.e. rate of return) standard and gave its reasons at length.[4] The court below did not question this portion of the Commission's opinion or the findings based thereon.

The Commission separately considered Sierra's contention that the contract specified rate must first be found unlawful before a new rate could take effect and rejected it on grounds that may be concisely summarized as (1) that all rates, including contract specified rates, fall within the scope of Section 205 of the Federal Power Act, and (2) that Section 205 does not require such a finding.[5] Nevertheless,

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3. Appendix C hereto. Two Commissioners dissented but did not discuss the question of law on which the Court of Appeals determined the case.

4. Appendix C, pp. 16 to 22.

5. Appendix C, pp. 26 to 29.

the Commission considered the evidence in the light of Sierra's contentions and concluded that if such a finding "were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful."[6] This conclusion, together with the rest of the Commission's opinion, was expressly incorporated by reference in the Commission's findings.[7]

Sierra's petition for rehearing was denied by the Commission and it petitioned the Court of Appeals for the District of Columbia Circuit for review. The court of appeals, in a decision rendered February 24, 1955, directed that the Commission's order be set aside and the case remanded with directions either to dismiss the proceeding or for further proceedings under Section 206(a) of the Act, on the ground that the contract specified rate could not be increased except by a proceeding under Section 206(a) of the Act in which a finding is made that the contract specified rate is unlawful.

On March 23, 1955, in response to a motion by Sierra, the court modified its order to direct the Commission to dismiss the proceeding, but without prejudice to the initiation of a new proceeding under Section 206(a).

6. Appendix C, p. 30.
7. Appendix C, p. 31.

REASONS FOR GRANTING CERTIORARI

1. This case involves interpretation of an important provision of a major federal statute regulating interstate commerce. It involves the extent of the authority granted to the Federal Power Commission by the Federal Power Act to regulate rates for the sale of electric energy at wholesale in interstate commerce. Particularly, the case involves the effect of private contracts upon the exercise of such regulatory power. The continuing importance of the subject matter of the case is, therefore, obvious and needs no elaboration.

2. The opinion of the court below clearly errs in the approach to the problem and in the conclusion reached. The result is that by reading an exception into Section 205(d) of the Act, the court makes a distinction between procedures applicable to rates embodied in contracts and those applicable to rates embodied only in tariffs. The Act itself makes no such distinction. Considerations of policy do not favor such a distinction and there is no warrant for believing that Congress ever intended such a distinction. The court, however, by making the distinction, narrowly and unnecessarily limits the application of the refund procedure provided by Section 205(e) of the Act to minimize losses resulting from regulatory delays.

3. Moreover, in making the distinction, the court seriously impairs the powers of the Commission. The court decides that the Commission has no power to fix the exact level of just and reasonable rates for a utility service where the wholesaling public utility and the distributing company have made a contract specifying the rate for that service. The court held that the Commission may take only a judicial approach to contract specified rates and that it may not change such rates where they lie within the judicially permissible area. The special competence of the Commission

to determine what is the particular reasonable rate for a given service is not to be allowed to come into play in such cases. This drastic limitation upon the Commission's powers should be carefully reviewed by this court to determine whether Congress intended such a result.

4. The decision below is based in large part on the opinion of the Court of Appeals for the Third Circuit in *Mobile Gas Corporation v. Federal Power Commission*, 215 F.2d 883 (1954), a case arising under rate regulation provisions of the Natural Gas Act,[8] which were based upon the earlier Federal Power Act. This case, however, was taken up on writs of certiorari shortly after the decision in the case at bar and is now pending before this court.[8a] The reasons advanced in the petitions for certiorari in the *Mobile* case are, in the main, applicable and equally important here, but the several differences between the Natural Gas Act and the Federal Power Act should also be considered by this court. In particular, it should be pointed out that the decision of the court below deprives the petitioner of the equitable refund procedure available to it under Section 205(e) of the Power Act, resulting in the possibility, if not certainty, of a major windfall to Sierra. The decision unnecessarily gives Sierra the benefit of regulatory delay. In the *Mobile* case, on the other hand, the choice was not between the use of an equitable procedure and one giving the benefit of delay to a particular party; under the Natural Gas Act provisions applicable to that case, the choice lay between placing the burden upon one party or the other. The possibility of minimizing the burden by an equitable refund procedure was not there present.

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8. 52 Stat. 821, 15 U.S.C. 717-717w; cf. Sections 205 and 206 of the Federal Power Act with Sections 4 and 5 of the Natural Gas Act.

8a. Case Nos. 436 and 556.

5. According to the court below, the only error committed by the Commission lay in the failure to make a finding as to the present reasonableness of the contract specified rate. It is clear, however, that the Commission made such a finding on the basis of issues fully and expressly litigated before it. That this finding appears in the Commission's opinion, rather than its formally enumerated findings, is immaterial since the opinion was expressly made a part of the findings.

6. Having found error because of the omitted finding, the court below erroneously ordered dismissal of the case, directly contrary to applicable precedents of this court.[9] Having pointed out the error, the court should have permitted the Commission to reconsider the matter so that neither party would be unjustly enriched because of the Commission's error.

The statements of fact by the court below ignore certain findings of the Commission and are directly contrary to the record in certain respects. Since these errors are not material to the basis of the court's decision, we are not concerned with them here and will not enumerate them in this petition. The argument which follows points out the correct construction of the pertinent provisions of the Federal Power Act (Point I), the error in the approach made by the court below (Point II), the reasons why the contrary interpretation should have been made (Point III), and the serious effect of the court's interpretation upon the Commission's regulatory powers (Point IV). Finally, the argument points out the clear error and unjust effect of the court's directions for remand, and the resulting interference with the Commission's powers (Point V).

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9. *Florida v. United States*, 282 U.S. 194, 215 (1931); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

I.

THE LANGUAGE OF THE FEDERAL POWER ACT APPLIES THE RATE FILING METHOD OF INITIATING RATE INCREASES TO ALL RATES, WITHOUT DISTINCTION.

Sections 205 and 206 of the Act set forth the general scheme for regulation and control of power rates subject to the jurisdiction of the Federal Power Commission.

Section 205 sets up the plan for the day-to-day functioning of regulation. First, this section imposes the primary duty upon regulated utilities to charge only just and reasonable rates without discrimination or preference. Second, these utilities are required to file with the Commission their schedules of rates and charges. Third, the method is set up by which the utilities are to change their rates to make them just and reasonable. A statutory waiting period permits the Commission to review any change in a rate before it becomes effective. The Commission may if it is not then satisfied, or if it receives a complaint, hold hearings to determine the lawful rate, suspend any proposed increase for five months, and order refund of any increase collected after the five months' suspension to the extent that the increase is not proved by the filing utility to be reasonable.

It should particularly be noted that this section refers to *all* rates and charges. Congress did not distinguish between rates embodied in tariff schedules and rates embodied in contracts. A contract rate clearly becomes effective by reason of the filing, not by operation of the contract.[9a] In fact, when referring to contracts in Section 205, Congress described them as contracts "relating to" rates and it may fairly be concluded that Congress had in mind that contracts would relate to rates, not fix them.

9a. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

The language of Section 205(d) reads in part:

"* * * no change shall be made by any public utility in any such rate * * * or contract relating thereto, except after thirty days' notice * * *. Such notice shall be given by filing * * * new *schedules* * * *" (Emphasis supplied.)

It is notable that both a rate and a contract may thus be changed by filing a "schedule." If this wording is effective to permit rates to be changed by a filing, as all admit, it must be equally effective to permit a contract relating to rates to be changed by a filing.

It is, of course, possible that a utility might fail in its duty to determine and file just and reasonable rates. Section 206(a), therefore, gives the Commission authority, on its own motion or on complaint, to determine whether an existing rate is just and reasonable, and if not, to fix the just and reasonable rate.

The Court below holds that the present proceeding should have been initiated under the latter section. But Section 206(a) was framed to authorize complaints about public utilities, not by them. Except to eliminate a preference in favor of some customer, the section seems to contemplate that any resulting revision of rates would be downward. Otherwise, it is difficult to explain the fact that, although Section 205(e) expressly places the burden on the public utility to show that an increased rate is just and reasonable, no corresponding requirement is expressed in Section 206(a). It is also difficult to explain why the court below interprets the Act to require a procedure which the utility is to initiate by a complaint against itself.

The scheme of regulation described in Section 205 is not unusual or unique and is often referred to as the "filed rate" policy. Cases from Arkansas, Colorado, Missouri, New York

and Pennsylvania have permitted filed rate increases to take effect for service rendered under contract.[10] A recent decision of the Illinois Supreme Court shows that the "filed rate" policy is accepted in that state.[11]

Wichita R. R. v. Public Utilities Comm., 260 U.S. 48 (1922), referred to by the court below, does not aid in interpreting the Federal Power Act because that case was decided upon the express assumption that the Kansas statute involved did not adopt the "filed rate" procedure.

II.

THE CHOICE DOES NOT LIE BETWEEN A PROCEDURE WHICH ABROGATES CONTRACTS AND A PROCEDURE WHICH DOES NOT.

The foregoing description of the regulatory scheme of the Act was not, however, accepted by the court below. Adopting a suggestion by Sierra, it stated:

> "The novel and important question for decision is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has

10. *Harrison Electric Co. v. Citizens Ice & Storage Co.*, 149 Ark. 502, 232 S.W. 932 (1921); *Denver & S. P. Ry. Co. v. City of Englewood*, 62 Colo. 229, 161 Pac. 151 (1916), writ of error dismissed 248 U.S. 294, 39 S.Ct. 100 (1919); *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 57 S.Ct. 345 (1937); *North Hempstead v. Public Service Corp.*, 231 N.Y. 447, 132 N.E. 144 (1921); *Public Service Commission v. Pavilion Natural Gas Company*, 232 N.Y. 146, 133 N.E. 427 (1921); *Suburban Water Co. v. Borough of Oakmont*, 268 Pa. 243, 110 A. 778, 781 (1920). See also *Duquesne Light Company v. Public Service Commission*, 273 Pa. 287, 117 A. 63 (1922); *Leiper v. Baltimore & P. R. Co.*, 269 Pa. 228, 105 A. 551 (1918); *V. & S. Bottling Company v. Mountain Gas Company*, 261 Pa. 523, 104 A. 667 (1918) appeal dismissed 251 U.S. 544, 64 L.Ed. 406, 40 S.Ct. 218.

11. *Antioch Milling Company v. Public Service Company of Northern Illinois*, 123 N.E. 2d 302 (Ill., 1954).

been abrogated by the Commission's power under the Act to regulate rates."

This raises a false issue. All contracts for public utility service are subject to the exercise of the legislative power of regulation.[12] The possibility of change by regulatory powers does not nullify or abrogate such contracts. We are concerned here to determine how the Act specifies that contracts shall be changed, not whether they shall be changed. All this is, of course, conceded by Sierra and assumed by the court below.

They insist, however, that to apply the "filed rate" process of the Act to contracts is to abrogate or nullify all rate contracts subject to the Act. Clearly, this does not follow. The possibility of change is inherent in all public utility service contracts. That the change may be initiated by a rate filing by one of the parties (or, indeed, by a complaint by the other) does not nullify the contract. The "filed rate" procedure is well recognized, as we have shown,[13] and where it is prescribed any public utility service contracts which specify rates must imply the use of that procedure.[14] That

12. "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Munn v. People of Illinois*, 94 U.S. 113 at 134.

13. Supra, notes 10 and 11.

14. See e.g., *Suburban Water Co. v. Borough of Oakmont*, supra, at p. 781, where the Pennsylvania Supreme Court said in holding that a filed rate may supersede a contract rate: "All public service contracts are viewed in the light of having been made with an

the use of contracts subject to the "filed rate" procedure is desirable is eloquently demonstrated by the situation in the natural gas industry. There, numberless rate increases have been instituted since the war by filings under Section 4(d) of the Gas Act and almost without exception they involve sales made under contracts which in some manner specify the rates to be charged. Yet, new contracts are being made every day for gas sales subject to the Gas Act. The point is that both pipeline and distributing companies, accepting the "filed rate" process as a fact, still find contracts useful to establish conditions of sale for the time being.[15]

It is not true, therefore, that the court below was choosing between a mode of regulation which abrogated contracts and one which did not. The only choice to be made was between two methods by which such contracts could be changed.

These considerations also dispose of the court's adoption of a restrictive rule of interpretation because the taking away of a "common law right" was involved.[16] No one has a right to a particular mode of regulation[17] and the contract here in question was entered into 12 years after the filed rate procedure of the Power Act was adopted.

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implied provision that the rate named therein is subject to change, according to law, so as to keep it reasonable and non-discriminatory at all times."

15. The absence of any reported challenge to the application of the filed rate process under either the Power Act or the Gas Act prior to the present case and the *Mobile* case should have some weight, too.

16. Appendix A, p. 4.

17. See *Munn v. People of Illinois*, supra, note 12.

III.

AS A MATTER OF POLICY, AS WELL AS OF INTERPRETATION, THE APPLICATION OF THE RATE FILING PROCEDURE TO CONTRACT SPECIFIED RATES IS ESSENTIAL.

We turn to a comparison of the procedure under Section 205 with that under Section 206(a) to ascertain whether as a matter of policy, it is reasonable to conclude that Congress intended what it said when it prescribed the filing procedure for all rates without distinction.

1. The Filing and Review Procedure of Section 205 Assures Commission Control of Rates Without Unnecessary Administrative Burden.

Under Section 205 a filed increase may become effective without formal, affirmative Commission action whereas under Section 206(a) a hearing and order is required in all cases. However, this is not to say that under Section 205 the utility may act arbitrarily in filing a rate increase. At least thirty days must elapse between the date of filing and the effective date of the new rate. The Commission has, by rule, enlarged the notice period to sixty days for increases in rates and has required the utility to file detailed information in support thereof.[18] Thus the Commission has basic data and full opportunity for review of each filing.

In any case where the Commission is not satisfied with the supporting data or in which it receives a protest (as in the instant proceeding) it may order a hearing to determine and fix the just and reasonable rate. Section 205(e) authorizes the Commission, after full hearings, to make such orders with reference to the rate in question as would be

18. 18 C.F.R. Section 35.3(e).

proper in a proceeding initiated after the rate had become effective, i.e., in a Section 206(a) proceeding. Thus, in any contested increase proceeding, the Commission's powers are identical under either section.

The procedure just described constitutes due process of law whether applied to rates embodied in tariffs or to rates embodied in contracts.[19] There is nothing in the procedure which makes it any less legal, equitable or practicable in one situation or the other.

2. The Refund Procedure of Section 205 Minimizes the Hardship of Regulatory Delay and Should Be Used as Extensively as Possible.

Section 205(e) permits a contested rate increase to become effective, subject to refund, after a five months' suspension period, whereas under Section 206(a) no change in rate can be made until the Commission has held a hearing and made a formal determination. The collection and refund procedure was clearly intended to minimize hardship resulting from delays in the regulatory process. When the just and reasonable rate is finally fixed, the utility must refund, with interest, any excess actually collected during the course of the proceeding. Thus, the utility finally retains and the customer pays only the proper amount.

Under Section 206(a) however, delays will frequently result in a windfall to one party and a loss to the other. Interpretation, then, should favor the use of Section 205 wherever possible, rather than Section 206(a), from the standpoint of equitable treatment of the parties during a contested rate proceeding. There is no reason why it should not be used where a contract specified rate is involved, and every reason why it should be used.

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19. See cases cited in note 10, supra.

3. The Filed Rate Procedure of Section 205 Does Not Give the Utility Any More Latitude Than the Complaint Procedure of Section 206(a).

The court below stressed the requirement of Section 206(a) that the existing rate first be found unreasonable before a modification is made. Section 205(e), on the other hand, requires the utility to prove the reasonableness of the new rate and is silent as to the old rate.

These would seem to be two sides of the same coin; if the new rate is reasonable, the old must be unreasonable and vice versa. The court below states, however, that "the statutory purpose may be satisfied by more than one rate."[20] Therefore, it concludes that to permit filed rates to supersede contracts would be to give the utility a choice among reasonable rates and that this should not be permitted if the court can interpret the statute in any other way.

The court, however, has confused judicial review of rates with the actual process of making rates. True, when a court applies statutory standards to a rate, it must be satisfied if the rate falls within a given area. Judges must use yardsticks, not micrometers, in passing upon the actions of regulatory commissions. The more precise evaluation of the various elements of reasonableness is left to the expert administrative body.[21] Obviously, this does not mean that the Commission chooses a rate at random within the statutory area. It weighs the various factors and concludes for itself what is *the* reasonable rate under all the circumstances. This is clearly what Congress intended it to do, for

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20. Appendix A, p. 5.

21. The court below quotes from *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) the following sentence: "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint." But this court went on to say in the same paragraph: "To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

in Section 206(a) it directs the Commission to "determine *the* just and reasonable rate * * * to be thereafter observed and in force."[22]

It may be that the court below visualized the Commission in a Section 205(e) hearing as simply applying to a utility's filed rate the judicial rules for review of a Commission fixed rate. It must be clear that this is not so. The Commission takes into account everything which is relevant to the reasonableness of the rate and determines reasonableness in accordance with its own precise, expert standard. Thus, in the case at bar, the Commission considered in detail (and rejected) Sierra's contention that contract considerations made the rate specified therein reasonable regardless of the subsequent rise in PG&E's costs.[23] The Commission was clearly engaged in carrying out its duty to determine the reasonableness of the rate filed by PG&E, not merely by rules of judicial review, but by exercise of its expert judgment as to reasonableness.

Even if it had judicial room to allow or require a different rate the Commission could not have been compelled to do so merely because of the existence of a contract specifying that rate. The power to choose among the judicially permissible rates was given to the Commission, not to contracting parties.

Evidencing the Commission's interpretation of its duties is the fact that it found that the existence and circumstances of Sierra's contract did not affect the reasonableness of the filed increase. This clearly disposed of the issue from the regulatory point of view regardless of whether the Commission added, as it did, that any lower rate would be unreasonable.

The burden of proof requirement of Section 205(e) reinforces the conclusion that contracting parties lose no rights under this procedure. The old rate, contract-specified

22. Emphasis supplied.

23. Appendix C, pp. 16 to 22.

or not, will remain as the effective rate under Section 205 unless the utility satisfies the burden of proof that the increased rate is just and reasonable. The presumption thus is in favor of the *status quo*. Similarly under Section 206(a), if the Commission or a complainant proposes a change in the rate the Commission must find the old rate unreasonable before ordering a change. Again, the *status quo* is favored. The use of the Section 205 procedure therefore does not deprive the purchaser of utility service under contract of any right which he would have had in a Section 206(a) proceeding.

IV.

THE DECISION BELOW PERMITS PRIVATE CONTRACTS TO CURTAIL THE RATE DETERMINATION POWERS OF THE COMMISSION.

The court below holds that the procedure of Section 206(a) must be used where the rate is specified by contract because a contract rate cannot be changed if it lies within the *statutory area* of reasonableness. This is a drastic limitation on the powers of the Commission. Where a contract specified rate is involved, the court would require the Commission to forget its position as an expert, make no use of its special competence as a regulatory authority, and determine whether the rate meets statutory standards from the judicial point of view. The Commission would be deprived of any opportunity to make a precise application of the standards from its expert point of view. The contracting parties would take over the Commission's function of deciding where, within the statutory area, the rate is to be fixed.

Surely, Congress intended no such result. Contract specified rates were subject to change by direct legislative action, within constitutional limits, long before the Power Act

was adopted.[24] In delegating authority over such rates to the Commission, Congress could not have intended to create an area of immunity from change and certainly used no language appropriate to such an intention.

In the *Montana-Dakota* case,[25] this court stated that the Commission's function is to reduce reasonableness to specific terms, in direct contrast to the judicial function of determining whether the rate lies within a permissible area. The Court was dealing there with an attack upon a contract rate so the language is especially appropriate here.

It has never been suggested that the Commission does not have power in the ordinary rate case to determine *the* reasonable rate for a given service. If the language of Section 205(e)—or of Section 4(e) of the Gas Act—is adequate for this purpose in the "ordinary" case, then it is equally adequate for the case involving a contract specified rate.

The severe and unusual limitation which the court below would impose on the Commission's powers, clearly requires examination by this court to determine whether Congress intended such a result.

V.

THE REFUSAL OF THE COURT BELOW TO PERMIT THE COMMISSION TO CORRECT ITS ALLEGED ERROR WAS CONTRARY TO DECISIONS OF THIS COURT AND USURPED THE COMMISSION'S REGULATORY AUTHORITY.

The Commission stated in its opinion herein that, if a separate finding on the lawfulness of the contract rate were necessary, it would have to be that the contract rate was unreasonably low and therefore unlawful. This conclusion

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24. *Munn v. People of Illinois*, supra, note 12.

25. Supra, note 20.

was expressly incorporated in the Commission's formal findings,[26] apparently for the very purpose of avoiding the need for further proceedings in the event that the Commission had misconstrued the law. The court disregarded this conclusion, however, on two grounds. First, it stated that it was based upon a record in which the reasonableness of the contract rate was not in issue, and, second, it stated that the Commission carefully avoided a finding on these issues.[27] These statements are clearly contrary to fact. Not only was the issue raised at the outset and evidence introduced thereon, but both PG&E and Sierra requested opposite findings thereon. Furthermore, the Commission gave the issue separate and careful consideration in its opinion, and made its conclusion a part of its findings.[28]

Even so, the court below originally directed the case to be remanded for dismissal "or for further proceedings under Section 206(a)",[29] thus giving the Commission an opportunity to correct its error. On motion of Sierra, however, the court modified its direction and directed absolute dismissal, but "without prejudice to the initiation of a new proceeding under Section 206(a)."[30]

This is directly contrary to this court's decision in *Florida v. United States*, 282 U.S. 194 (1931) where, in setting aside a rate increase order of the Interstate Commerce Commission for lack of essential findings, this court left the Commission free to make such determinations as the situation might require (282 U.S. at p. 215). This court held in a subsequent proceeding involving the same increase that

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26. All of the Commission's opinion was expressly incorporated in its findings and made a part thereof. Appendix C, p. 31.

27. Appendix A, p. 8.

28. Appendix C, pp. 30 and 31.

29. Appendix A, p. 8.

30. Appendix B, p. 9.

when the Commission supplied the necessary findings, the railroad was entitled to retain the increase collected during the course of the first proceeding since the findings showed that the rate then collected was no more than reasonable over the entire period. *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935).

If, as we assume, the court below intended to nullify the entire proceeding in the case at bar, then PG&E would be faced with refunding the very substantial increase collected from Sierra since September 6, 1953, in the face of an express conclusion of the Commission that any lesser rate was unreasonable. This court should not allow the principles of the two cases just cited to be disregarded in such a fashion. At the very least, the Commission should be permitted to make a formal finding on the issue.

The court's order, in effect, substitutes for the rate approved by the Commission a different rate without any determination by either the court or the Commission that the substituted rate is just, reasonable or lawful for the period in question. This is clearly an invasion of the Commission's rate-fixing powers, prescribing a result on procedural grounds which should be reached, if at all, only by Commission action.

We recognize that it may be contended that the entire proceeding was ineffective because initiated under Section 205 rather than 206(a), but this would indeed be harking back to the days when a common law plaintiff selected a writ at his peril. There can be no question that the Commission is in a position to render a decision in the instant proceeding in accordance with the principles laid down by the court below, if that is required.

As this court recently said in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), "The guiding principle, violated here, is that the function of the reviewing

court ends when an error of law is laid bare. At that point, the matter once more goes to the Commission for reconsideration." The ultimate determination to be made by the Commission in the case at bar is the reasonableness of a rate. That determination cannot be made in the first instance by a court nor can it foreclose the Commission from making such a determination.

CONCLUSION

It is submitted that this case involves questions of major importance in the interpretation and administration of the rate regulation powers of the Federal Power Commission under the Federal Power Act.

It is further submitted that the decision of the court below is so clearly in error and involves such serious consequences that this court should issue a writ of certiorari to review the judgment.

Respectfully submitted,

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Dated: April 22, 1955.

(Appendix Follows)

Appendix A

United States Court of Appeals
For the District of Columbia Circuit

No. 12430

Sierra Pacific Power Company,
Petitioner

v.

Federal Power Commission,
Respondent

Pacific Gas and Electric Company,
Intervenor

On petition to review an order of the
Federal Power Commission

OPINION

Decided February 24, 1955

Mr. William C. Chanler, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. Lawrence A. Baker* was on the brief, for petitioner.

Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, with whom *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, was on the brief, for respondent.

Mr. F. T. Searls, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with

whom *Mr. Robert E. May* was on the brief, for intervenor.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* In 1938, Pacific Gas and Electric Company, a public utility under the laws of California, and Part II of the Federal Power Act,[1] entered into its second 15-year contract to sell electric energy to Sierra Pacific Power Company, a public utility under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by P G & E, or the development of a new source of power. Accordingly, in 1947 Sierra commenced negotiations with P G & E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

At first P G & E offered a 15-year contract at the 1938 contract rates but with an "escalator fuel clause." Sierra rejected this and turned to intensive negotiations with governmental agencies for "cheap Government power." P G & E then proposed a lower rate (the so-called P-31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P-31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise "be lost altogether" to public power competition. But a significant condition of this approval was that any loss from such service would be borne by P G & E's stockholders and not by its other customers.

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1. 49 Stat. 847 *et seq.* (1935), 16 U.S.C. § 824 *et seq.* (1952).

In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other customers under the P-31 schedule.[2] The Commission refused on the ground that the special contracts were entered into "in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *." In February 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under § 205 of the Federal Power Act.[3] Sierra thereupon intervened. It urged that § 205, which provides for Commission approval of newly proposed rates merely upon a finding that they are reasonable, is not applicable where, as here, approval would effect unilateral abrogation of a duly filed rate contract; that to effect such abrogation the Commission must first make the determination, provided for in § 206(a), that the rate contract to be superseded is "unjust, unreasonable, unduly discriminatory or preferential * * *."[4] The Federal Power Commission rejected this contention by a vote of three to two and approved the increased rates upon a finding; under § 205, that they were reasonable. Sierra brought this petition to review the Commission's action.

The novel and important question for decision is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates. Congress did not expressly abrogate that right. To find such abrogation by implication,

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2. With the significant exception of one city which still could have utilized Shasta Dam power.

3. 49 Stat. 851 (1935), 16 U.S.C. § 824d (1952).

4. 49 Stat. 852 (1935), 16 U.S.C. § 824e(a) (1952).

> "* * * we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."[5]

So guided, we examine the pertinent provisions of the Act.

Section 205(a) of the Federal Power Act requires that rates for the sale of electric energy within the Commission's jurisdiction shall be "just and reasonable." Section 205(c) provides that all rates, charges and contracts relating thereto shall be filed with the Commission. Section 205(d) provides that no change in such filed rates, charges, or contracts relating thereto shall be made without notifying the Commission. Section 205(e) authorizes the Commission, upon complaint or upon its own motion, to determine whether the newly proposed rate or charge is just and reasonable. In modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is "just and reasonable."[6]

Under § 206(a), on the other hand, a finding of unreasonableness *is* a prerequisite to modification of a filed rate. That section authorizes the Commisison, upon its own motion or upon complaint, to find that a rate, or contract

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5. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907). Cf. Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 252-53 (1954), where the Court remarked: "To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose."

6. 49 Stat. 852 (1935), 16 U.S.C. § 824d(e) (1952).

affecting such rate, is "unjust, unreasonable, unduly discriminatory or preferential." If it so finds, it must determine and fix a "just and reasonable rate, charge * * * or contract * * * to be thereafter observed * * *."[7]

The Commission argues that under both §§ 205 and 206(a) "the statutory scheme is to depend upon regulatory action and initiative in lieu of private contract to protect the buyers' interests—in the public interest." But we think this stretches the statutory scheme too far. The Act's primary aim is that only just and reasonable rates shall be charged. Since "statutory reasonableness is an abstract quality represented by an area rather than a pinpoint,"[8] the statutory purpose may be satisfied by more than one rate. Clearly, if contract rates are reasonable, the public interest does not require allowance of higher rates upon the unilateral application of the seller under § 205, just because the Commission deems the higher rates also to be reasonable. Therefore, it does not "deprive the statute of its efficacy" to give effect to a duly filed rate contract until such time as the rates specified therein are found unreasonable under § 206(a).

We cannot agree with the Commission that this view of the statutory scheme is inconsistent with § 205's requirement that contracts and notice of any changes therein shall be filed with the Commission.[9] Regarding a comparable requirement in a Kansas statute, the Supreme Court said, "The consent of the Commission * * * is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of

7. 49 Stat. 852 (1935), 16 U.S.C. § 824e(a) (1952).

8. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951).

9. 49 Stat. 851 (1935), 16 U.S.C. § 824d(c) and (d).

schedules."[10] Obviously the mere fact that two parties have agreed upon a rate, or to a change therein, does not effect an exemption from regulation. We think these references contemplate continued use, rather than abandonment, of rate contracts.

Our view of the statutory scheme is supported by a recent Third Circuit case, *Mobile Gas Service Corp. v. Federal Power Comm'n*,[11] and the authorities therein relied upon. Although the case arose under the Natural Gas Act, §§ 4 and 5(a) of that Act correspond almost verbatim with §§ 205 and 206(a) of the Power Act.[12] There, as here, the Commission had abrogated a pre-existing contract without any finding that the contract rate was unreasonable. With one judge dissenting, the Court of Appeals, in a carefully considered opinion, reversed the Commission's order. The court relied upon: (1) cases arising under the Public Utility Law of Kansas which contained provisions similar to §§ 4 and 5(a) of the Natural Gas Act;[13] (2) the interpretation of the Gas Act adopted by the Court of Appeals for the Tenth Circuit in *Colorado Interstate Gas Co. v. Fed-*

10. Wichita R.R. v. Public Utilities Comm'n, 260 U.S. 48, 56-57 (1922).

11. 215 F.2d 883 (3d Cir. 1954).

12. The Commission urges that the Mobile case differs from the present case in that the Commission was powerless under § 4(e) of the Gas Act to suspend the proposed increase pending determination of its reasonableness. While such a distinction exists, it was in no way determinative.

13. The Supreme Court of Kansas, in Kaul v. American Independent Telephone Co., observed: "The passage of the Act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon * * * *rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates.*" 95 Kans. 1, 4 (1915), emphasis supplied.

This view of the Kansas statute was embraced by the Supreme Court of the United States in Wichita R. R. v. Public Utilities Comm'n, 260 U.S. 48 (1922), and by the Court of Appeals for the Tenth Circuit in Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 64 F.2d 881 (10th Cir. 1933).

eral Power Comm'n,[14] (3) the doctrine that common law rights will not be impaired without a clear authorization;[15] (4) a colloquy at hearings on a predecessor bill;[16] and (5) the significant lack of debate on the question in view of the drastic impact wholesale abrogation of contracts would have had on the natural gas industry.[17] These grounds apply here.

Cases relied on by the Commission do not sustain its position. *Tyler Gas Service Co. v. United Gas Pipe Line Co.*, which the Commission asserts is inconsistent with the *Mobile* case, expressly withheld any opinion as to the

14. 142 F.2d 943, 954 (10th Cir. 1944), *affirmed*, 324 U.S. 581 (1945), where the Court said: "The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. *Such rates and charges could be modified only after a finding of unreasonableness.*" Emphasis supplied.

15. Citing Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); and Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

16. Since the provisions in question were virtually identical with those of the Power Act, which were already in operation, the witness' understanding of their meaning is pertinent here. That colloquy reads as follows:

"Mr. Halleck. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract could be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?

"Mr. Booth. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return from the fair value of its property." *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 4008*, p. 43, 75th Cong., 1st Sess. (1937).

This clearly suggests the understanding that contracts would remain in force unless they were "earning an unfair return * * *," *i.e.*, were unjust and unreasonable.

17. We have been referred to no pertinent legislative history of the Federal Power Act, nor have we been able to find any discussion of the present problem in either the debates or committee reports.

correctness of that decision.[18] *Midland Realty Co. Kansas City Power & Light Co.* upheld the constitutionality of the procedure adopted here by the Commission, but did so "upon the construction that the [Missouri] supreme court put upon the statute."[19] Obviously, in construing the Federal Power Act, we are not bound by the Missouri court's construction of its statute.

Although the Commission has at all times insisted that no finding of unreasonableness is required, the majority opinion approving the increase stated:

> "* * * if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum P G & E is willing to accept."

This statement, however, is based entirely upon a record made in a proceeding under § 205(e) in which the unreasonableness of the contract rate was not in issue. And, in any event, as the dissenting Commissioners observed, "no such finding is made. Rather, it seems to have been carefully avoided."

For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions either to dismiss the proceeding or for further proceedings under § 206(a).

So ordered.

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18. 217 F.2d 73, 78 (5th Cir. 1954).

19. 300 U.S. 109, 113 (1937).

Appendix B

No. 12,430

United States Court of Appeals
For the District of Columbia Circuit

January Term, 1955

Sierra Pacific Power Company,
Petitioner,
vs.
Federal Power Commission,
Respondent,
Pacific Gas and Electric Company,
Intervenor.

Before: Prettyman, Bazelon and Bastian, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioner's motion to amend the last paragraph of the opinion of this Court, entered herein February 24, 1955, of the answer thereto filed by intervenor, and of the objections to said motion filed by respondent, and of petitioner's reply to said answer and objections, it is

Ordered by the Court that the aforesaid motion be granted and that the last paragraph of the opinion be, and it is hereby, amended to read as follows:

> "For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under § 206(a)."

Per Curiam.

Dated: March 23 1955

Appendix C

United States of America
Federal Power Commission

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of Pacific Gas and Electric Company	Docket No. E-6482

OPINION NO. 270

OPINION AND ORDER TERMINATING PROCEEDING

This is a proceding under Section 205(e) of the Federal Power Act to determine the lawfulness of a proposed rate increase estimated to amount to $419,400 (28.4%) on the basis of 1953 operations, for wholesale electric service rendered by the Pacific Gas and Electric Company (PG&E) to the Sierra Pacific Power Company (Sierra).[1]

The increase was proposed on February 2, 1953, when PG&E tendered for filing, pursuant to Section 205(d) of the Act, a proposed supplemental rate schedule, to become effective April 6, 1953, tentatively designated as Supplement No. 1 to its Rate Schedule FPC No. 3. PG&E, by the

1. Sierra has received wholesale electric service from PG&E under several successive contracts since 1923. The service here involved is rendered by the delivery of energy by PG&E over two 60-kv and one 110-kv transmission lines extending approximately 27 miles from PG&E's Drum Substation and Spaulding hydroelectric plant on its interconnected system which serves a large portion of the State of California, to Summit near the Donner Pass where the energy passes to like lines of Sierra and is then transmitted to Sierra's interconnected system serving load centers chiefly located in northern and northwestern Nevada and to a minor extent in eastern California.

proposed supplement, sought to substitute the increased demand and energy rates[2] for those theretofore used[3] in billing Sierra for approximately 40,000 kw of firm power purchased from PG&E under an agreement, designated as PG&E's Rate Schedule FPC No. 3, entered into March 4, 1948. That agreement, by its terms, is to continue until July 1965, or for a period of 15 years after the in-service date of an additional 110-kv line which may be constructed pursuant to the agreement. The proposed supplemental rate schedule would leave unaltered other terms of the 1948 agreement including (1) the provision for the purchase from PG&E by Sierra of 4000 kw of power as stand-by for hydroelectric generating plants on Sierra's system at the rate of $30,000 per year, (2) the 15-year term provision, (3) the minimum bill provision, and (4) the provision which prevents Sierra from building any additional generating facilities or from obtaining any of its energy supply from any other new source except under "minor standby and minor exchange agreements" for the duration of the agreement.

The Public Utilities Commission of California, the Public Service Commission of Nevada, and Sierra were invited to comment upon the proposed increase. The California Commission declined to comment in view of the pendency of a related proceeding before it. The Nevada Commission

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2. The proposed demand and energy charges are similar to PG&E's schedule "R" now on file with the Public Utilities Commission of California as a rate generally available for service in intrastate commerce to resale customers with no generating facilities of their own and purchasing only from PG&E.

3. The demand and energy rates which would be superseded are similar to PG&E's schedule "P-31" formerly on file with the California Commission as a rate generally available for service in intrastate commerce to resale customers with no generating facilities of their own and purchasing only from PG&E.

filed a response in which it stated that because of the present contractual agreement between PG&E and Sierra it opposed the proposed increase and requested that a public hearing be held before any increase be granted. Sierra also requested a hearing before this Commission stating that it regarded the rates contained in the proposed supplement to be unjust and unreasonable because the former rates had been designed to meet a competitive situation, and in any event that it possessed certain contract rights under the 1948 agreement which could not be changed under the rate filing and suspension provisions of Section 205 of the Act, but only under the rate complaint and investigation provisions of Section 206 upon a finding that the 1948 contract and rates are unlawful.

By order issued March 13, 1953, this Commission suspended the rate increase embodied in the proposed supplemental rate schedule and ordered that a hearing be held concerning the lawfulness of the proposed rate.

Sierra's petition for leave to intervene was granted but the Commission denied Sierra's further request to reject the proposed supplement as improperly filed under Section 205. That request was made by Sierra in order to obtain a determination by this Commission, in advance of any determination on the merits of the proposed rate, that contract rights may not be changed under the rate filing and suspension provisions of Section 205 of the Act. The denial was stated to be without prejudice to Sierra's right thereafter to maintain its contentions. An application for rehearing of the refusal to reject the proposed supplemental rate schedule was dismissed by an order which stated that:

> "The petition for rehearing * * * must be dismissed as being improperly filed because the matters therein sought to be reviewed involve only an interlocutory

and procedural ruling and do not involve a final decision by this Commission of the only substantive issue as to which a rehearing is sought."

On May 1, 1953, the hearing set by our order of March 13, 1953, was concluded after all parties were afforded an opportunity to present evidence in support of their respective positions. The intermediate decision procedure was omitted and oral argument was presented by all parties before the full Commission.

Subsequent to the oral argument the Commission set the proceeding down for further argument on the following six questions:

"(1) How has the rate of return derived under the contract in the period since it was entered into compared with the rate of return foreseen or reasonably foreseeable by P.G.&E. when it entered into the 1948 contract, and with the rate of return experienced initially under the 1948 contract?

"(2) How has the growth in amount of capacity and energy sold under this contract compared with the growth foreseen or reasonably foreseeable by P.G.&E. when it entered into the 1948 contract, in its effect on rate of return from this sale?

"(3) How has the increase in operating expenses and plant investment allocable to this business compared with that foreseen or reasonably foreseeable by P.G.& E. when it entered into the 1948 contract?

"(4) What has been the net effect of changes of foreseen and not reasonably foreseeable by P.G.&E. in the amount of capacity and energy sold under this contract and in operating expenses and plant investment allocable to this business?

"(5) Was the rate of return on this business which was experienced during the year 1952 a rate of return

foreseen or reasonably foreseeable by P.G.&E. at the time the contract was entered into?

"(6) How has the rate of return derived under this contract since it was entered into compared with the rates of return derived under the other special contracts under which P.G.&E. sells electricity for resale?"

PG&E thereafter requested further hearing after failure of all counsel to reach an agreement as to the enlargement of the record (without additional hearing) which counsel for PG&E and Sierra deemed necessary in addressing themselves to the questions for consideration on reargument. Such further hearing was held and all parties afforded an opportunity to present additional evidence in support of their respective positions. That hearing was concluded on March 24, 1954.[4]

On April 23, 1954, reargument on the questions we had posed was presented by all parties before the full Commission.

Subsequently, Sierra requested leave to file certain proposed supplemental findings of fact and conclusions of law in support of certain contentions hereinafter summarized. Counsel for PG&E and Staff Counsel opposed the requested findings. In the view we take of this proceeding as hereinafter set forth we regard those requested findings and conclusions as unnecessary or unwarranted.

JURISDICTION

Inasmuch as no question concerning this Commission's jurisdiction over the sale here involved was raised by any party to this proceeding, jurisdiction being specifically

4. The record as enlarged includes certain exhibits proffered by Staff Counsel at the conclusion of the prior hearing held in this proceeding.

admitted by both PG&E and Sierra, we will pass on first to a consideration of the lawfulness of the proposed rates as contemplated by the requirements set forth in Sections 205 (a) and (b) and then to a consideration of Sierra's contentions concerning the scope of the rate filing and suspension provisions of Section 205 of the Act.

REASONABLENESS OF THE PROPOSED RATE

With a possible exception which we later will show to be unfounded, there is no dispute that the proposed rate will not provide more than PG&E's cost of rendering the service here involved to Sierra, including in such costs return on an allocated portion of PG&E's net investment at a rate of return (5½%) which would be reasonable for its electric operations as a whole. The cost of service based on the test year 1952 is shown by an exhibit (Exhibit 19) prepared at the Staff's request by PG&E in accord with applicable precedents of this Commission.[5] That exhibit shows that the proposed rate will provide revenues sufficient to yield a return to PG&E of 4.75% on a net investment rate base.

Staff counsel regarded the cost of service for the test year as requiring adjustment to reflect lower income taxes in the

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5. Incorporated within Exhibit 19 are certain changes proposed by the Staff from the method of computing cost of service and rate of return used by PG&E in its Exhibits 3 and 4. Basically Exhibit 19 develops cost of service by applying a 5½% rate of return, which all parties agreed for the purposes of this case would be reasonable for PG&E's electric operation as a whole, to a net investment rate base computed by deducting from original cost of plant the accrued depreciation reserve requirement and adding working capital. This method of computing cost of service and rate of return is consistent with prior determinations by this Commission and is reasonable in this proceeding, as is the 5½% rate of return stipulated by the parties to be a reasonable rate of return for PG&E's electric operations as a whole; and the method of computation adopted by PG&E in its Exhibits 3 and 4 insofar as it departs from that used in Exhibit 19 is not accepted.

immediate future which would result from PG&E's accelerated amortization of certain of its facilities in computing state and federal income taxes.[6] If any adjustments in the test year figures are to be made, PG&E's counsel thought adjustments should be made to reflect increased operating expenses from wage increases granted during the test year but reflected in its exhibits only for a part of the year, increases which have already occurred in fuel costs, and increases in expenditures for fuel which would have resulted had the test year been an average instead of an exceptionally high water year. Evidence to support such adjustments was not introduced because they would be too small to affect the conclusions predicated upon the use of the unadjusted test year figures. Accordingly, we find the use of the unadjusted test year figures for cost of service sufficient for the purposes of this proceeding.

Notwithstanding the fact that even the proposed increased rate will not provide a 5½% rate of return, Sierra urges that this is of no consequence in this proceeding. It argues that the present lower contract rate is just and reasonable because that rate, along with all other terms of the 1948 agreement, was offered by PG&E in an effort to retain Sierra as a customer during a period when, it says, alternative sources of power were available to it at competitive rates. Sierra maintains that it gave up all opportunity to meet its system power requirements from such other sources, notably from the United States Bureau of Reclamation, in reliance upon the binding effect of all terms of the 1948 agreement. It insists that to change the rate set forth in the 1948 agreement and leave unaltered, among other things, the 15-year term provision, the minimum bill pro-

6. That was before our decisions issued December 4, 1953, in Opinion 264 and April 15, 1954, in *Panhandle Eastern Pipe Line Co.*, Opinion No. 269 (mimeog., pp. 45-49).

vision and the provision against utilization of other sources of power would be grossly unfair. Sierra seeks support from the California Commission's orders originally approving the 1948 agreement and subsequently refusing to authorize an increase in the rate provided therein.

Although the Commission is not confined to one particular method of determining whether a rate is just and reasonable (Cf. *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-586), we have, upon an examination of the record in this proceeding concluded that sufficient reason has not here been shown for departing from the cost of service method, for the following reasons:

First, we cannot accept Sierra's premise that because the 1948 contract rate was negotiated under competitive conditions, that rate necessarily remains just and reasonable. For it has long been well established that a public utility cannot by contract place its rates beyond the reach of regulation by public authority. *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U.S. 372, 375; *Producers Transp. Co. v. Railroad Commission*, 251 U.S. 228, 232; *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582-583.

Second, we find Sierra's argument that it has foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement unconvincing in the light of the record which clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source.

Third, we also find unconvincing Sierra's argument that it would be grossly unfair to change the rate set forth in the 1948 contract while leaving all other terms unaltered, in view of the fact that Sierra has not shown, and on cross examination its president could not suggest any alterations which he thought should be made in other terms if the rate were changed as proposed.

Fourth, with respect to the California Commission's orders, we fail to see how they can bind this Commission in the exercise of its jurisdiction or limit the effectiveness of the filing provisions of the Federal Power Act,[7] even if they were to be construed as Sierra argues. We do not undertake to decide whether they should be so construed for the question of the jurisdiction of the California Commission is disposed of by the facts upon which we find that the sale is a sale at wholesale in interstate commerce subject to the regulation provided in the Federal Power Act. See *United States v. P.U.C. of California*, 345 U.S. 295.

Fifth, even if PG&E's entry into the 1948 contract were to be accepted as demonstrating that the then foreseeable rate of return under that contract must be deemed the rate of return which is still reasonable for this particular business, it appears from the record here that due to the increases in other costs which have occurred since then[8] the presently proposed increase will merely restore that rate of return, not go above it.

We think it necessary to discuss in more detail only the fifth of these conclusions.

In order to compare the rate of return which the proposed rate is expected to produce with that reasonably foreseeable at the time the 1948 contract was negotiated, PG&E made comparisons of costs of service, computed by the same

7. State Commission regulation, even in matters properly within the jurisdiction of the state commission, is no limitation on subsequent federal regulation. *United States v. New York Telephone Co.*, 326 U.S. 638, 647-648.

8. PG&E's exhibits show that the increase in volume of sales to Sierra (over the forecast as of the time the 1948 contract was negotiated), with the resulting decrease in revenue per unit of service, was responsible for only a very insignificant part of the decrease in the actual rate of return below what was reasonably foreseeable. This was not disputed.

methods which it had initially employed in this case (Exhibits 3 and 4, referred to in footnote 5 above). While those methods produce lower rates of return than the methods employed in the exhibit upon which we principally rely in our findings herein and indicate, for example, that 1952 earnings under the proposed rate would be 3.23% instead of 4.75%, we find that the use of those methods provides a sufficient basis for the following comparison among themselves of rates of return under the two schedules for different years:

Year	Reasonably foreseeable rate of return under 1948 contract rate, as of the time it was negotiated (%)	Reasonably foreseeable rate of return under proposed rate on this record (%)
1947	3.56	
1952	3.03	3.23
1956	3.12	3.15
1963	3.20	3.35

Within the margin for errors which we would expect in such computations these figures indicate that there is no substantial difference between the rate of return which PG&E seeks by the present proposal, and that which was reasonably foreseeable at the time the 1948 contract was negotiated.

We do not find Sierra's arguments against these figures persuasive.

Thus Sierra contends that what we have denominated "the reasonably foreseeable rate of return under 1948 contract rate as of the time it was negotiated" is purely hypothetical—never actually presented to PG&E's management in those figures and in writing at the time the contract was being negotiated. But it is clear to us from the evidence of record that PG&E's management did have substantially

equivalent information.[9] For we think it must reasonably be inferred that PG&E's management was capable of and did appreciate the effect of the only substantive adjustments reflected in these figures to the cost of service study then made for it, and did not have to have the figures presented in the same form as they have been presented here in order to be guided by the same essential considerations.

So also we think that Sierra misinterprets the significance of the papers drawn from PG&E's files upon which it rests its contention that PG&E expected a 6% rate of return from the Sierra business at the P-31 rate, and based that expectation upon the use of a different method of allocating costs to the service to Sierra. That question was orally argued at length at the reargument before the Commission and we have concluded that the computations referred to by Sierra related to alternative offers which might be made to Sierra and whether there was any real likelihood of a better offer than PG&E's P-31 rate (plus a charge for 4,000 kw of standby capacity for Sierra's hydro plants). They were not computations of PG&E's costs of service under the P-31 rate, and involved no assumption that those costs would properly be determined upon any other basis of allocation than that reflected in the percentage figures we have set forth.

Even if PG&E's management had, for some purpose, assumed that only the costs of transmission from Shasta to

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9. The record shows that these percentages were developed from a cost of service study based upon 1946 costs made and submitted to the management for the purposes of the negotiations which eventually resulted in the 1948 contract rate. They embody only two further adjustments: the decreased revenues the 1948 contract rate would provide as compared with PG&E's first offer to Sierra, and recognition that by the time agreement was actually reached, PG&E's operating costs had advanced 10% over the 1946 levels used in the cost of service study (the latter is, of course, in the nature of a concession against interest by PG&E).

Summit plus PG&E's cost of power purchased from the Central Valley Project should be deemed its cost of service to Sierra, we could not accept that fact as a sufficient reason for this Commission to depart from its consistent practice, absent special circumstances, and accept such an "allocation" as a basis for a forecast of costs of or a rate of return from PG&E's service to Sierra under the P-31 rate.[10]

Sierra's particular reliance upon Mr. J. S. Moulton's memorandum of February 16, 1948, as indicating the contrary is wholly unavailing. Mr. Moulton seems at most to be suggesting a possible method of attempting to justify before the California Commission the 1948 contract rate which he recognizes would return less than the properly allocated cost of the service—a method which never appears to have been adopted by PG&E:

> "In general connection with the proposed contract, the rate is less than the allocated cost of service. If we

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10. If such an "incremental" cost basis were to be adopted, on the uncontroverted evidence in this record the P-31 rate would still not provide a 6% return, or any return at all on PG&E's investment in the transmission facilities. Sierra's claim that it would is based on the assumption that the Central Valley Project power required to serve Sierra would have cost PG&E 3.74 mills per kwh for 232,000,000 kwh including 10% losses, or $870,000, in 1952, leaving $328,000 to cover PG&E's $375,000 cost of transmission from Shasta to Summit.

But, the figure of $870,000 for cost of Central Valley Project power is based on the 1952 average cost to PG&E of all the energy it purchased from Central Valley Project, including not only firm power (the kind required to serve Sierra) but very large amounts of dump power, which would not meet Sierra's needs or satisfy its contract right to receive firm power. If PG&E's cost of firm power purchased from the Central Valley Project is used, $1,109,000, the revenues produced by the P-31 rate would barely have covered that cost, leaving only $89,000 remaining to meet the $375,000 transmission cost.

Furthermore there is no warrant for the Commission to adopt a method of determining cost of serving a particular customer from an integrated electric power supply system which considers only the cost of energy from a single source of power on that system.

are called upon by the Public Utilities Commission to justify it when approval of the contract is requested, it can be done only on the basis of assigning a low cost of power to the supply and the use of increment costs for the balance of the items entering into the total cost of service."

Accordingly, we conclude that the proposed rate is not unjust or unreasonable.

DISCRIMINATION

It does not appear that the proposed rate will be unduly discriminatory or preferential.

That rate is substantially the same as that used by PG&E in rendering wholesale electric service to the California-Oregon Power Company pursuant to a special contract filed as its rate schedule FPC No. 6, which is the only other schedule PG&E has on file with this Commission involving a firm sale for resale in interstate commerce. The two services appear to be generally comparable except that the cost of rendering the California-Oregon service is roughly 1/7 less than the cost of this service, such differential being due to the special investment in PG&E's three transmission lines from its Drum Substation and Spaulding hydroelectric plant on its interconnected system to Summit where delivery is made to Sierra, and the additional cost of maintaining and operating these lines.[11] However, inasmuch as the record does not show that the rate to California-Oregon

11. The method used in preparing Exhibit 19, which PG&E's witness thought reasonable, does not distinguish the costs associated with the special facilities used solely to serve Sierra from those associated with PG&E's total integrated plant, but rather, treats such special facilities as part of PG&E's total integrated plant, a portion of which is allocated to Sierra. The Commission's Staff suggested such treatment in view of the failure of PG&E to exclude costs associated with similar special facilities for serving certain other customers or areas from total integrated plant costs, a portion of

exceeds the cost of rendering that service, causing it to bear a disproportionate share of PG&E's total expenses, or show that ultimate consumers affected by that rate are at a competitive disadvantage as compared with ultimate consumers served by Sierra, this differential does not of itself make the proposed rate unduly discriminatory or preferential.

In addition to the foregoing the record shows that PG&E renders generally comparable wholesale electric service in intrastate commerce under special contract to the Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, Ukiah, the Plumas-Sierra Rural Electric Cooperative, and the Sacramento Municipal Utility District at rates between 14% and in one case 38% below the proposed rate to Sierra. However, as it does not appear from the record that these rate differentials will cause the Sierra service to bear any disproportionate part of PG&E's total expenses, inasmuch as even with the proposed increase the rate to Sierra will not exceed the cost of serving it, or that either Sierra or the ultimate consumers served by it will suffer any competitive disadvantage by reason thereof, these differences do not appear to amount to an undue preference or discrimination.

We conclude that the proposed demand and energy rates set forth in Supplement No. 1 to PG&E's Rate Schedule FPC No. 3 are not unjust or unreasonable, and not unduly discriminatory or preferential, and are therefore not unlawful.

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which PG&E had allocated to Sierra in addition to the costs associated with the special facilities used solely to serve it. Under the circumstances of this case we find the treatment of special facility costs embodied in Exhibit 19 reasonable for the purpose of determining the reasonableness of the rate to Sierra; but for the purpose of comparing the rates to Sierra with those to California-Oregon, the investment in special facilities to serve Sierra, and expenses of operating them must be recognized, as it is in the text.

THE FILED-RATE PROVISIONS OF THE ACT

Sierra, in opposing the proposed increase, has advanced the following contentions with respect to the procedures by which an increase in a contract rate may become effective:

> First, that Section 205 of the Act does not authorize an alteration of a contract to be effectuated by the unilateral act of a public utility filing a new rate schedule or by an order of the Commission entered in a proceeding held on the suspension of such a filing. Rather, it says, such alterations may be accomplished only in a rate investigation under Section 206, upon a finding that the contract and rate fixed therein are unlawful.
>
> Second, that when a new schedule is filed pursuant to Section 205(d) embodying a change in a contract rate previously on file with this Commission, the previously filed contract and rate set forth therein must be found to be unjust, unreasonable, or unduly discriminatory or preferential, before the new rate can be allowed to stand.

We will not pause to discuss the apparent inconsistency of these contentions, the first denying that a contract can ever be altered under Section 205 and the second arguing that it can be altered under that section if a certain finding (not specified in that section) is made, but will proceed to a consideration of each in turn, they having been exhaustively briefed by both Sierra and the Staff Counsel.

On each of the several previous occasions when we have been called upon to interpret the scope of Section 205 of the Power Act or the equivalent Section 4 of the Natural Gas Act, we have rejected any contention that an abrogation of

contract rights may not be worked by the operation of the statutory rate filing and suspension provisions.

In *City of Los Angeles v. Nevada California E. Corp.*, 2 F.P.C. 104, the defendant public utility contended that the Commission did not have power to reduce a contract rate charged a municipal wholesale purchaser on complaint by the purchaser because, defendant argued, the seller did not have a correlative right to secure an increase if the rate were too low. We answered by stating that the seller did have a correlative right—the right to file increased rates (2 F.P.C. at page 109):

> "Under Section 205(d) of the Act, public utilities may file with the Commission proposed changes in their filed rates and charges. This provision appears to negative defendant's contention and to afford adequate protection to it."

In *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 1044, *petition to review dismissed*, 170 F.P.C. 150 (C.C.A. 8) we allowed a supplemental rate schedule filed pursuant to Section 4(d) of the Gas Act to become effective without the 30-day delay otherwise prescribed by that section. The supplement added a surcharge to contract rates which had previously been reduced pursuant to Commission order. The effect of the surcharge was to increase the contract rates (as previously modified by the Commission).

The result of the ruling of the Court was that without any Commission finding or other action, the seller was able by its unilateral action of filing the surcharge to change the contract rate notwithstanding the objection of the buyer.

In *Panhandle Eastern Pipe Line Co.*, 9 F.P.C. 443, we overruled a contention advanced by customers of Panhandle that this Commission lacked authority under Section 4 and 5 of the Gas Act to order the allocation of gas to customers

of Panhandle on terms different from those contained in existing contracts, citing our prior decision in *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 196, 204, in which we had relied upon *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U.S. 372, and *Producers Transp. Co. v. Railroad Commission*, 251 U.S. 228, and pointing out (9 F.P.C. at page 446):

> "Section 4 of the Natural Gas Act, as well as Section 5, provides an adequate legal basis for our order. See *Ayrshire Corp. v. United States*, 335 U.S. 573 (1949)."

Section 4 of the Gas Act corresponds insofar as material here to Section 205 of the Power Act, and Section 5 of the Gas Act, to 206 of the Power Act.

We have carefully examined Sierra's first contention and must reject its argument that the express language of Section 206 supplementing the authority of this Commission under that section to fix rates found to be unjust, unreasonable, unduly discriminatory or preferential, with the power to "fix" "any * * * contract * * * affecting such rate," found to be unjust, unreasonable, unduly discriminatory or preferential, establishes the only procedure by which an abrogation of a contract rate may be accomplished under the Power Act, and therefore necesarily precludes any action under Section 205 which would have the effect of changing an existing contract rate.

Indeed, even a cursory examination will show that the provisions of Section 205 expressly authorize the alteration of contracts. Section 205(c) provides for the filing of "schedules showing all rates and charges * * * together with all contracts which in any manner affect or relate to such rates or charges * * *." Section 205(d) authorizes changes in any "rate" or "charge" or in any "contract" relating to

such "rate" or "charge" to be effectuated "by filing with the Commission * * * new schedules stating plainly the change or changes to be made in the schedule or schedules then in force * * *." Section 205(e) confers upon the Commission the power to suspend changes sought to be effectuated under Section 205(d) and provides by reference power to prescribe the "rate" or "contract" to be thereafter observed if it finds the rate or charge as proposed unjust, unreasonable, unduly discriminatory or preferential. If it does not so find, the Commission fixes no new rate or contract and the proposed rate or charge filed pursuant to Section 205(d) becomes effective upon termination of the Commission's suspension, under the authority of Section 205(d).

Only because a public utility making sales at wholesale has the power acting unilaterally by filing changed rate schedules to change the rates fixed by its prior contracts can it perform the duty which was shown to be upon it when the Court in *Pennsylvania W. & P. Co. v. Consolidated G. E. L. and P. Co.*, 184 F.2d 552, (C.A. 4), *certiorari denied*, 340 U.S. 906, said that:

> "One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions * * *."

As to Sierra's second contention that the old contract rate must be found unlawful before a new rate can take effect, we believe that the provisions of Section 205 show that it is clearly without merit. There is nothing in that section that qualifies or limits the right and duty placed upon the seller to maintain rates which satisfy the statutory standard by any requirement for the consent of the buyer or for a Commission finding with respect to the former con-

tract rate. The sole condition is that the filed rate may not become effective in less than 30 days (unless the Commission otherwise orders) and the Commission may suspend any filing and prescribe a rate in lieu thereof if, after hearing, it finds that the changed rate proposed by the suspended filing is unlawful.

We think that the conclusion that there is no legally enforceable contract rate after the seller's filing of a new schedule has become effective, other than the rate set forth in the newly filed schedule necessarily follows from the language of the Supreme Court in *Montana-Dakota U. Co. v. Northwestern P. S. Co.*, 341 U.S. 246, 251:

> "It [the customer company] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission and not even a court can authorize commerce in the commodity on other terms."

We do not see that this plain meaning of the rate filing and suspension provisions of Section 205 raises any question of constitutionality, as Sierra appears to contend, citing *Wichita Railroad & Light Company v. Public Utilities Commission*, 260 U.S. 48. The provisions of the Kansas statute there involved seem plainly to have required commission approval before the filing of a rate change became effective which would distinguish that decision from the problem under the Power Act. As the Court pointed out in *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 112, when it was considering a decision of the Supreme Court of Missouri which had construed the Missouri public utilities statute[12] as allowing a utility to abro-

12. Revised Statutes of Missouri, 1929, Chapter 33, Art. 4. This statute is, in its here pertinent provisions, very similar to the Power Act.

gate existing contract rates by the mere filing of a new schedule of rates (in addition to authorizing the rate order which the State Commission had later entered to the same effect:

> "Defendant's contention is not that the State lacked power by appropriate action to establish and enforce just and reasonable rates but that, as against the constitutional provisions invoked, the action taken under the public service commission law was not sufficient to abrogate the contract rates * * *. There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers. * * * and if [utility customer] here insists that the contracts could not be abrogated "without a proper hearing, finding and order of the commission with respect thereto." It does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and non-discriminatory rates depends upon or is conditioned by *specific adjudication in respect of existing contract rates*. It is clear that, *as against those specified in the contract here involved, the rates first filed by plaintiff* [*utility*] and those promulgated by the Commission in accordance with the statute *have the same force and effect as if directly prescribed by the legislature*. * * * Plainly, enforcement of the rates in accordance with the statute *did not violate either the contract clause of the constitution or the due process clause of the Fourteenth Amendment*." (Emphasis supplied)

We, therefore, conclude that Sierra is in error in its contention that the filing should be rejected and that it cannot

become effective upon the findings which we make. However, we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum PG&E is willing to accept. Notwithstanding the stipulated fact that 5½% is generally a reasonable rate of return on the electric utility business of PG&E, the company is willing to accept a rate producing a 4.75% return from this particular part of that business as not unreasonably low; the evidence also shows that such a rate of return is not substantially different from the rate of return which it was willing to accept from this business at the time it negotiated the 1948 contract rate, as we have already noted. It is apparent that PG&E regards the deficiency of .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra. With the investment which PG&E has made and has undertaken to make in special facilities on which it would earn no return at all if it lost this particular business, it would require evidence of a kind not presented in this record to warrant a finding that the 4.75% rate of return it is willing to accept from this sale is unreasonably low. Not only is there no such evidence but it affirmatively appears that this deficiency is not offset by any excess return from other sales subject to our jurisdiction and that the California Commission has ruled that such deficiencies may not be offset by excesses from other PG&E sales which are subject to its

regulatory jurisdiction.[13] This, and the fact that no undue discrimination or preference results from the deficiency, as we have already seen, makes clear that the proposed rate is not unreasonable and is lawful. But no such considerations, on this record, warrant a conclusion that any rate substantially lower than that proposed would be reasonable, and hence we would have to conclude that the 1948 contract rate is now unreasonable and unlawful.

The Commission, having considered the record with respect to the matters involved and the issues presented and having issued its Opinion No. 270 which is hereby incorporated by reference and made a part hereof, further *finds*:

1. PG&E, as the holder of licenses issued for the hydroelectric projects designated in the records of the Commission as Project Nos. 77, 78, 87, 96, 99, 137, 175, 178, 180, 181, 184, 187, 233, 335, 423, 444, 471, 502, 525, 606, 616, 619, 708, 737, 772, 776, 802, 803, 869, 889, 911, 926, 1017, 1018, 1031, 1061, 1121, 1153, 1183, 1187, 1190, 1194, 1258, 1295, 1318,

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13. The Public Utilities Commission of California in an opinion dated October 15, 1952, in a proceeding involving a general rate increase by PG&E stated, with respect to the 1948 agreement with Sierra and certain other contracts PG&E had entered into (all of which were referred to as special resale contracts), at pp. 41-42 as follows:

> "The Commission, in considering these special contracts, is of the opinion that an opportunity should be afforded the parties to renegotiate these contracts, should they so determine. It is obvious that underlying costs have increased since these contracts were negotiated. Since by this decision a new basic resale schedule is being adopted, opportunity should be afforded for renegotiation of these contracts in the light of the new basic resale schedule. The revenues from these services will be computed at the new resale schedule for the purpose of determining applicant's over-all revenue requirements only, but the rates for such resale contract customers will not now be increased. By this method no burden will be placed on the other classes of customers but any burden will fall on the stockholders' portion of the earnings until such time as the contracts may have been renegotiated and have been authorized by the Commission."

1332, 1333, 1335, 1352, 1354, 1361, 1392, 1403, 1408, 1544, 1550, 1632, 1790, 1962, 2019, and 2118, is a licensee under Part I of the Federal Power Act.

2. PG&E is also a "public utility" within the meaning of Part II of the Act by reason of its ownership and operation of facilities among others for the transmission, and for the sale to Sierra for resale, of electric energy which is transmitted from California and consumed at points in Nevada, which facilities are in addition to, and do not include, facilities for the generation of electric energy, facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or facilities for the transmission of electric energy consumed wholly by the transmitter.

3. PG&E makes such sale to Sierra, as it has to that company or its predecessor since 1923, by transmission facilities enlarged from time to time, extending from its interconnected transmission system in California at a transmission substation known as the Drum Substation and a hydroelectric plant known as the Spaulding plant a distance of approximately 27 miles to a point of delivery at Summit near the Donner Pass in the Sierra Mountains, in California. Sierra receives delivery at Summit and transmits the energy thence by its transmission facilities connecting with its interconnected transmission system by means of which it serves customers in eastern California and a large area in northern and northwestern Nevada.

The present interconnecting transmission facilities consist of two 60 kv, and one 110 kv, three-phase, single circuit wood pole transmission lines and appurtenant facilities. Energy deliveries over the 60 kv lines are metered at Summit, while those over the 110 kv line are metered at Sierra's "California" substation with adjustment for intervening transmission losses.

4. In 1951, approximately nine-tenths of Sierra's energy sales were made in Nevada, six-sevenths of its customers are located in Nevada, and seven-eighths of its revenues are from Nevada, the remainder, California. Its purchases from PG&E in 1952 constituted approximately 85% of its peak demand and 77% of its total annual energy requirements. Approximately 86% of the kilowatt hours purchased from PG&E in 1951 were used in the service of customers in Nevada.

5. The sale by PG&E to Sierra, the negotiation, execution and terms of the contract, and deliveries thereunder covered all energy delivered to Sierra without respect to the point of its ultimate consumption, whether in California or Nevada, and at no time has any distinction of any kind been made or attempted by the parties, or, so far as the record shows, by any regulatory agency, for any purpose, based upon the points of ultimate consumption.

6. The sale by PG&E to Sierra of all of the energy delivered at Summit is a sale at wholesale in interstate commerce, and subject to the provisions of Sections 205 and 206(a) of the Federal Power Act.

7. The following rate schedules have been filed with this Commission by PG&E for resale service to Sierra (or its predecessor) prior to the tender of the proposed Supplement No. 1 to its Rate Schedule FPC No. 3.

Rate Schedule No.	Other Party	Date of Agreement	Date Filed	Effective Date
FPC No. 1	Truckee River Power Company (Predecessor to Sierra)	3/23/23	2/17/39	9/1/23
FPC No. 2 (Supersedes FPC No. 1)	Sierra Pacific Power Co.	6/ 6/38	2/17/39	6/6/38
FPC No. 3 (Supersedes FPC No. 2)	Sierra Pacific Power Co.	3/ 4/48	6/ 7/48	1/1/48

8. The increased rate embodied in Supplement No. 1 to Rate Schedule FPC No. 3 has been satisfactorily shown to be such as to provide not more than a fair return on the portion of PG&E's net investment rate base properly allocable to that service after proper allowance for all operating expenses, as shown by Exhibit 19.

9. No other facts have been shown affecting the justness and reasonableness of the proposed rate, and it is therefore not unjust or unreasonable.

10. The proposed rate is substantially the same as the rate charged California-Oregon Power Company for the only other resale service rendered by PG&E in interstate commerce for which it has filed schedules with this Commission. Although the total cost of rendering this service to Sierra is approximately 1/7 more than serving California-Oregon, the two sales appear to be otherwise generally comparable. Inasmuch as it does not appear that the rate to California-Oregon exceeds the cost of serving it, or that the ultimate consumers connected therewith are placed at a competitive disadvantage as compared to ultimate consumers connected with this sale to Sierra, this cost differential does not, of itself, appear to make the proposed rate unduly discriminatory or preferential.

11. Inasmuch as the proposed rate to Sierra is not more than the cost of serving it and neither Sierra nor ultimate consumers served by it will suffer any competitive disadvantage by reason of the fact that PG&E makes certain other comparable resale sales in intrastate commerce at rates estimated to be between 14% and in one case 38% below the proposed rate, such differences do not appear to amount to an undue discrimination or preference.

12. The proposed rate is not unlawful.

The Commission *orders*:

The proceeding initiated by our order issued March 13, 1953, in this docket be and the same hereby is terminated. By the Commission. Commissioners Smith and Doty dissenting.

LEON M. FUQUAY,
Secretary.

Adopted: June 16, 1954
Issued: June 17, 1954

In the Matter of Pacific Gas and Electric Company	Docket No. E-6482

DOTY and SMITH, Commissioners, *dissenting*:

We think no useful purpose would by served by our undertaking to analyze extensively or to answer in detail all the varied, and to a considerable degree labored, stages whereby the Commission's opinion supports the purely negative findings relied upon by the majority to justify the lawfulness of the rate change here under consideration. To do so would, we suspect, lead to still further confusion and obfuscation of what we regard as the relatively simple basic issues involved in this matter. As we see them, the essentials here are susceptible of straightforward and succinct determination.

While agreeing with the majority that the private contract between these parties (over which jurisdiction is admitted by both of them) is subject to our regulatory modification for adequate cause shown in a proper proceeding, we are not persuaded by the facts of record that such a showing has been made in this proceeding. Indeed, it is our conclusion that the evidence shows the rate provided for therein

when considered in relation to the other terms of the contract (which the Commission's order does not disturb) and in the light of all the relevant attendant circumstances and conditions, to be lawful—because not unjust, unreasonable, or unduly discriminatory—and therefore that it should be continued in effect.

We reach this conclusion for three major, compelling reasons, which, while to some extent interrelated, may be distinguished and stated very briefly.

In the first place, it does not seem to us that the question is whether the proposed rate is substantially the same as that charged the California-Oregon Power Company for the interstate wholesale service furnished it by PG&E, but whether the circumstances surrounding the origin and development of existing contractual relationships between PG&E and Sierra have been such as to justify—or in equity to require—special consideration by us similar to that evidently given by the California Commission to the still lower rates granted by PG&E under special contracts to certain municipalities and cooperatives within that State, apparently for reasons not entirely unlike those which led to its initial favorable rate treatment of Sierra.

As we see it, such special consideration is clearly called for here. It is a matter of common knowledge that PG&E has constantly, vigorously, and with no little success resisted the expansion of sales of electric energy from federal hydroelectric projects to others within its general service area. The evidence here indicates that such considerations importantly influenced PG&E—and, no doubt, Sierra as well—in its negotiation of the long-term, exclusionary power-supply contract with Sierra on terms, so far as the rate is concerned, particularly favorable to the latter. It does not seem to us that the removal or diminution of the threat of competition from other potential power sources should

now, with our sanction, operate to deprive Sierra of the rate advantage of which it evidently availed itself in good faith, and in reliance upon which substantial investments in facilities have been made. In vernacular terms, PG&E—like Sierra in respect of the undisturbed 15-year term of the contract and its restrictive covenant regarding power supply—having made its bed, should be required to lie in it,—absent some showing of harm to the public interest if this axiom were followed.

We find no such indication of any damage whatever to the public interest thereby. On the contrary, the record shows that PG&E has voluntarily undertaken to absorb any deficiencies of return under these special contracts from earnings which otherwise would be available to its stockholders. Hence, continuation of the rate stemming from its previously enjoyed bargaining position would neither necessarily constitute an undue preference to Sierra nor impose any consequential burden upon the other customers of PG&E.

This brings us to the second factor to which we attach major significance in this matter: Whether, under all the circumstances, the low over-all return produced in the past and anticipated in the future under the rate in question is properly compensatory to PG&E. We think so. Although it is clear that on a full allocation of electric system costs it will yield less than the 5½ per cent net return which PG&E accepts as fair for its system operations, no one on this record denies that it adequately covers out-of-pocket costs. The evidence is by no means convincing as to what, if any, particular rate of return PG&E expected it to produce when the contract was negotiated, either then or in the future. In the circumstances, however, it appears extremely doubtful that any such calculation was used—if, indeed, such a projection could then have been made with any degree of

accuracy—as a basis for the managerial judgment exercised and decision made at that time. On the other hand, the evidence shows, not only that PG&E voluntarily undertook to absorb deficiencies of return under special contracts induced by considerations of competition and corporate policy, but also that its responsible officials recognized that such contracts could be justified in rate proceedings only on an incremental-cost basis.

We know of no rule or policy of this Commission to the effect that under any and all circumstances each rate for service must precisely return the full allocated system costs of such individual service. The weight of judicial opinion appears to be that, while individual rates must be compensatory, they may—and in practice quite frequently and naturally will—yield contributions of varying proportions to the over-all return of the enterprise. It is our opinion that, in all the circumstances of this case, the Commission should utilize the incremental-cost test in determining the reasonableness of the rate in question.

On this basis—according to additional evidence adduced during the reopened hearing, emphasized by Sierra in the reargument, and relied upon in its supplemental proposed findings and conclusions—the contract rate would produce at least a 6 per cent return on the facilities employed in rendering the service to Sierra, or substantially more than that stipulated by PG&E as fair for its electric operations overall. We think this is indicative of the reasonableness of the contract rates, and that Sierra's request to file its proposed supplemental requests for findings of fact and conclusions of law should not be brushed aside lightly as "unnecessary or unwarranted".

In this connection we note that, while the majority states that "* * * if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record

before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful", no such finding is made. Rather, it seems to have been carefully avoided. Is this because in a section 206 investigation it would be necessary, on the logic espoused, to raise Sierra's charges still further so as to yield a return at the stipulated 5½ per cent rate on fully-allocated system cost of the service? And the determinant of reasonableness here adopted appears to be the stated fact that PG&E "* * * is willing to accept a rate producing a 4.75% return from this particular part of that business as not unreasonably low * * * and regards the deficiency of .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra." Does this mean that if PG&E were now willing to accept a return of 3 per cent and a deficiency of 2½ per cent, or a return of 2 per cent and deficiency of 3½ per cent, such acquiescence on the part of PG&E would be accepted as determinative of the question? If so, what becomes of this Commission's function in respect of either the reasonableness *per se* of the rate or its possible unduly discriminatory relationship to other charges?

Finally, as to the matter of undue discrimination or preference, we must again disagree with the findings and approach of the majority. It concludes that, by comparison with the rates of PG&E to California-Oregon Power Company and the fully-allocated costs of that and this service, (Finding 10), and because the proposed rate to Sierra does not exceed the fully-allocated cost of service, *etc.* (Finding 11), the proposed rate is neither unduly discriminatory nor preferential.

From the foregoing discussion it is probably already clear that we regard these approaches as both invalid and directed to the wrong things, rather than to the essential

issues in this case. Because of our views as to the reasonableness of the contract rate in terms of the initial purposes and undertakings of the parties and its present justification on an incremental-cost basis, we deem the comparison with PG&E's charges to the California-Oregon Power Company and the emphasis on computations of fully-allocated system costs as being beside the point. In our opinion the present contract rate should be affirmatively found to be neither unduly discriminatory nor preferential.

Furthermore, it is conceded that PG&E has contemporaneously maintained similarly favorable rates to certain California municipalities and cooperatives,—notably to the City of Redding, which is immediately adjacent to the Shasta Dam. While these rates are not subject to our jurisdiction, but to that of the California Commission, we note, as does the majority, that the California Commission in 1952 pointed out that "* * * opportunity should be afforded for renegotiation of these contracts in the light of the new [increased] basic resale schedule." According to the record here, this has not been done; yet, under the theory of the majority opinion here the way would be open to raise such charges through unilateral action by the filing of higher tariffs. It seems strange justice to apply two different standards to possible discriminatory tactics by the same company under two different jurisdictions, without any effort to reconcile the two through cooperative consideration and consistent action by the federal and state agencies concerned.

DALE E. DOTY,
Commissioner

NELSON LEE SMITH,
Commissioner

Filed: June 16, 1954
Issued: June 17, 1954

Appendix D

Sections 205 and 206 of the Federal Power Act (Act of August 26, 1935, c. 687, 49 Stat. 851-2, 16 U.S.C. 824d) read as follows:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge,

classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed

change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSMISSION

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.